inducing legislation without invalidating it.[17] The resort to indirection may well foreshadow the future path of the law; it would seem but a matter of time before other courts will recognize the wisdom and soundness of the decision in the principal case.

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SUPPLEMENTING MEMORY WITH BUSINESS RECORDS. — To prove the contents of the ledger of a large mercantile or industrial establishment, is the testimony of the bookkeeper sufficient, or is it necessary to produce as witnesses the host of clerks, salesmen, or other employees who alone have first-hand knowledge of the facts therein recorded? A recent Kentucky decision, following Wigmore,[1] held that the testimony of the bookkeeper was sufficient, where the slips from which the books were compiled had been destroyed by fire and and the identity of those who had actually made the sales thereby lost. *Givens* v. *Pierson*, 167 Ky. 574, 181 S. W. 324. An analogous situation arises in the case of a large establishment which has lost track of former employees, or where the expense involved in the production of all who contributed to the record is too great to be practicable. A business man regards the entries in a day-book or ledger as trustworthy. What is to be the attitude of the courts?

Where a record is made by one having personal knowledge of the transaction, as is the case in a small business, and the recorder is put on the stand, legal proof of the transaction is easily secured. If the witness can testify to a present recollection of the events, with or without the aid of the record to refresh his memory, there is no need of the record as evidence.[2] But if, as frequently happens, he cannot testify from memory, the record may be admitted in evidence upon proper authentication by him.[3] The witness identifies the record. He may recall the circumstances under which he made that particular entry, or he may only be able to testify to the conditions under which he made all his entries. The record is in his handwriting; he made an entry only immediately after effecting a transaction, at which time he would carefully record it; therefore if the books record a sale, a delivery, or what not, he must have transacted it. Thus the witness testifies that he does not remember the transaction, but that he recorded it in the book at a time when he did remember. The book evidences what he recorded. Neither his statement nor the entry is of itself evidence of the transaction to be proved; taken together they testify to the event. The hearsay rule is not violated,

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Swasey, *supra;* City of Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673; Buffalo Branch Mutual Film Corporation, *v.* Breitunger, 95 Atl. 433; Fifth Ave. Coach Co. *v.* City of N. Y., *supra; In re* Wilshire, *supra.*

[17] Welch *v.* Swasey, 193 Mass. 364, 375, 79 N. E. 745, 746.

[1] WIGMORE, EVIDENCE, § 1530.

[2] Commonwealth *v.* Ford, 130 Mass. 64; Friendly *v.* Lee, 20 Ore. 202, 25 Pac. 396.

[3] Owens *v.* Maryland, 67 Md. 307; Haven *v.* Wendell, 11 N. H. 112; Merrill *v.* Ithaca & Owego R. Co., 16 Wend. (N. Y.) 586; Cole *v* Jessup, 10 N. Y. 96; State *v.* Rawls, 2 N. & Mc.C (S. C.) 331; Insurance Co. *v.* Weides, 14 Wall. (U. S.) 375; Bourda *v.* Jones, 110 Wis. 52; and see WIGMORE, EVIDENCE, § 754. Some courts, however, do not allow the records in evidence. People *v.* Elyea, 14 Cal. 144; Hoffman *v.* Chicago, M. & St. P. Ry. Co., 40 Minn. 60, 41 N. W. 301; and see Bates *v.* Preble, 151 U. S. 149, 154.

for the record is evidence, not of the transaction, but of what was recorded. Of that, of course, it is direct evidence.

The situation becomes more complicated as the size of the establishment is increased and a division of labor introduced. The entries in the book are no longer made by the individual employee who performed the act recorded, but are entered by a bookkeeper in accordance with reports made to him by this employee. Accordingly a similar division of labor is introduced into the proof.[4] The bookkeeper identifies the entries in the books and explains how he entered the facts as reported to him. The employee narrates the manner in which he reported the facts. Thus the employee says he reported the transaction accurately to the bookkeeper, the bookkeeper says he recorded what the employee told him, and the record shows what the bookkeeper recorded. The chain of evidence is now composed of a third link, but its essential character remains unaltered. The difficulty arises where the production of the employee becomes impossible or impracticable. If this link is omitted the proof involves hearsay. The testimony of the bookkeeper, supplemented by his books, is competent evidence of the report of the employee engaged in the transaction. But if the employee does not testify, evidence of his report is evidence of mere hearsay, and therefore inadmissible unless the report itself comes within the principle of some exception to the hearsay rule.

A recognized exception to the hearsay rule is that of regular entries made in the course of business. The exception is thus rationalized: The entries, although merely the written declarations of the recorder, and thus hearsay, are sufficiently trustworthy, by reason of the conditions under which made, to be admitted in evidence when the death of the maker excludes direct testimony.[5] Although under this exception it is the written declarations (the entries) of the declarant himself that are put in evidence, yet the principle of the rule applies to the case under discussion. Here the necessity of a record made by the declarant himself is dispensed with by proof of his declaration through the records of the bookkeeper, as outlined above. There remains the problem of dispensing with the witness, a situation similar to that involved in the regular entry exception to the hearsay rule — the circumstance now being that of regular reports in the course of business instead of regular entries. The question is, what unavailability other than death of the entrant, or reporter, is sufficient to admit his entries, or evidence of his reports, in spite of the hearsay rule? Recognizing that unavailability of the witness was the real basis of the exception, courts have held, in the case of regular entries, that insanity or absence from the jurisdiction was sufficient.[6] Should not unavailability on the ground of impracticability suffice? Where the employees are numerous, the cost of producing all who have contributed to the record may be prohibitive, and the

[4] Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468; Mayor, etc. of New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905.

[5] See WIGMORE, EVIDENCE, § 1522.

[6] Insanity: Town of Bridgewater *v.* Town of Roxbury, 54 Conn. 213, 217, 6 Atl. 415, 418; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 109. Absence from jurisdiction: North Bank *v.* Abbot, 13 Pick. (Mass.) 465, 471; Cameron Lumber Co. *v.* Somerville, 129 Mich. 552, 89 N. W. 346; Alter *v.* Berghaus, 8 Watts (Pa.) 77.

delay to the court not inconsiderable. In one reported case the testimony of 4500 workmen would have been required to identify their time-slips from which the entries in the books were compiled.[7] Against the cost involved in compelling the production of such evidence, including the delay to the courts and the loss to justice in the exclusion of probative matter, there can be balanced but the slight evidentiary value of the testimony of a host of clerks, salesmen, teamsters, or weighers, to the effect that they were in the habit of making accurate reports. From the nature of the situation, the volume of business transacted, they cannot testify to more.

On this analysis the evidence may be admitted without violence to the traditional hearsay rules. The result squares with a pragmatic, business-like view of such documentary evidence as account books, ledgers, etc., a view which looks upon the credibility of such records as arising out of the nature and character of the business, and not from the personality of the recorder. According to this view the records are evidence as business records, not as declarations of the recorder,[8] and so, whatever the conditions of their admission, the hearsay rule has no application to their composition. If the books of the X. Co. are admitted in evidence because the books of the X. Co. are trustworthy, it makes no difference whether the records were kept by clerk A. or clerk B., or whether A., the deceased clerk, made the entries upon information known to him personally or upon information known to his fellow clerk B., or *vice versa*. Thus regular entries made in the course of business would be admissible though founded on hearsay, and, *a fortiori*, such entries would be admissible to supplement recollection. After all, the admissibility of evidence is merely a question of a balance of convenience, and it may well be that the law of evidence, in its development as a rationalization of the intuitions of earlier trial judges, has suffered from an overdose of logic. At any rate, authority for the liberal rule is not wanting.[9] Where

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[7] Wis. Steel Co. *v.* Md. Steel Co., 203 Fed. 403.

[8] Note this attitude toward such evidence in Hare & Wallace's notes to 1 SMITH'S LEADING CASES, 8th Am. ed., 574. Perhaps it was some such attitude toward this class of evidence which lead the earlier publicists to speak of it as *res gestae*. See, for example, Hare & Wallace's notes, *supra*, p. 571. At any rate, courts will frequently be found speaking of regular entries as a special species of circumstantial evidence instead of as the declarations of an absent witness.

[9] Northern Pacific Ry. Co. *v.* Keyes, 91 Fed. 47; Wis. Steel Co. *v.* Md. Steel Co., 203 Fed. 403; Fielder Bros. & Co. *v.* Collier, 13 Ga. 496; Indianapolis Outfitting Co. *v.* Cheyne Electric Co., 52 Ind. App. 153, 100 N. E. 468; Meyer *v.* Brown, 130 Mich. 449, 90 N. W. 285; Remer *v.* Goul, 185 Mich. 371, 152 N. W. 91; Corkran & Meloney *v.* Rutter, 76 N. J. L. 375, 69 Atl. 954; Imhoff *v.* Fleurer, 2 Phila. 35; Jones *v.* Long, 3 Watts (Pa.) 325; International & G. N. R. Co. *v.* Startz, 42 Tex. Civ. App. 85, 94 S. W. 207; Scruggs *v.* Woodley Lumber Co., 179 S. W. 897 (Tex.).

But *contra*, San Francisco Teaming Co. *v.* Gray, 11 Cal. App. 314, 104 Pac. 999; Chicago Lumbering Co. *v.* Hewit, 64 Fed. 314; Schnellbacher *v.* Plumbing Co., 108 Ill. App. 486; Cincinnati N. O. & T. P. Ry. Co. *v.* Smith & Johnston, 155 Ky. 481, 159 S. W. 987 (unless distinguished on the ground that only one witness was absent, overruled by the principal case); White *v.* Wilkinson, 12 La. Ann. 359; Kent *v.* Garvin, 1 Gray (Mass.) 148; Atlas Shoe Co. *v.* Bloom, 209 Mass. 563, 95 N. E. 952. (But note Massachusetts exception in case of train dispatcher's records, Donovan *v.* Boston & Maine R., 158 Mass. 450, 33 N. E. 583.) Swan *v.* Thurman, 112 Mich. 416, 70 N. W. 1023 (overruled by later decisions, *supra*, though not referred to); Paine *v.* Sherwood, 21 Minn. 225, 239; Chaffee & Co. *v.* United States, 18 Wall. (U. S.) 516, 539.

courts are unable, or unwilling, to meet the demands of the situation, this would seem a fit field for legislative action. Such legislation would have the advantage of being able to work out detailed rules having regard to the size and nature of a business with reference to the trustworthiness of its records. In any event a large amount of discretion should be left to the trial court.

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THE LIABILITY OF THE MANUFACTURER OF A DEFECTIVE AUTOMOBILE TO A SUB-VENDEE. — The much discussed question of the liability of a manufacturer of an article which, because of his negligence, is defective, to a remote vendee who is injured as a result of the defect, has been passed on by the New York Court of Appeals in a way which will undoubtedly settle the question in that state. In a recent case, the manufacturer of an automobile was held liable to a sub-vendee for an injury resulting from a defective wheel which negligent inspection had allowed to become a part of the machine. *McPherson* v. *Buick-Motor Co.*, 54 N. Y. L. J. 2339.

It is well settled that the manufacturer of an article impliedly warrants its merchantability and general fitness for use.[1] This is a comparatively modern rule, but is merely an extension of the stringent liability early imposed on the seller of food.[2] The rule is now extended to all articles, and an automobile is clearly not an exception.[3] But since a warranty does not run with the goods,[4] it can only be taken advantage of by the immediate vendee.[5]

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[1] Jones *v.* Bright, 5 Bing. 533; Randall *v.* Newson, 2 Q. B. D. 102; The Nimrod, 141 Fed. 215. In England, the same warranty is implied on a sale by a dealer. Frost *v.* Aylesbury Dairy Co., [1905] 1 K. B. 608; Preist *v.* Last, [1903] 2 K. B. 148. The weight of American authority, however, holds that a dealer who is not a manufacturer makes no such warranty in the sale of specific goods. White *v.* Oakes, 88 Me. 367, 34 Atl. 175; Gage *v.* Carpenter, 107 Fed. 886.

[2] The rule that a dealer in food warrants its wholesomeness was probably originally statutory. See Burnby *v.* Bollett, 16 M. & W. 644. It is now generally accepted at common law. Wallis *v.* Russell, [1902] 2 I. R. 585; Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154; Wiedeman *v.* Keller, 171 Ill. 93, 49 N. E. 210. A few courts, however, have recently denied the rule in cases where the dealer has no part in the preparation of the goods and no chance to find out defects, basing their decision on its alleged unsuitability to modern conditions. Bigelow *v.* Maine Cent. R. Co., 110 Me. 105, 85 Atl. 396. Valeri *v.* Pullman Co., 218 Fed. 519. This is certainly strong ground for holding the liability of the person first in fault to extend to sub-vendees. It is notable that the New York Appellate Division, while feeling bound by authority to hold a dealer in food to a liability as warrantor, has, in a recent case, declared its reluctance to do so. Rinaldi *v.* Mohican Co., 54 N. Y. L. J. 2188.

[3] See Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

[4] Prater *v.* Campbell, 110 Ky. 23, 60 S. W. 918; Smith *v.* Williams, 117 Ga. 782, 45 S. E. 394; Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288. See WILLISTON, SALES, § 224. There are, however, *dicta* to the contrary in Childs *v.* O'Donnell, 84 Mich. 533, 538, 47 N. W. 1108, 1109, in Mazzetti *v.* Armour & Co., 75 Wash. 622, 624, 135 Pac. 633, 634, and in Catani *v.* Swift & Co., 95 Atl. 931, 932 (Pa.).

[5] It is of course true that a middleman who has been obliged to pay damages to his vendee may recover them back from his vendor. Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166; Reese *v.* Miles, 99 Tenn. 398, 41 S. W. 1065. It has even been held that a middleman who is liable for breach of warranty, but who has not yet paid, may recover his prospective damages from his vendor. Buckbee *v.* Hohenadel Co., 224 Fed. 14. See 29 HARV. L. REV. 221. It must follow that the sub-vendee can proceed against the